Mueller Insulation Co. and The Mueller Company of Missouri, Inc., successor employer and/or *alter ego and* Larry Crump and Terry Crump. Cases 14–CA–15342 and 14–CA–15342–2

August 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On April 26, 1982, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

AMENDED CONCLUSIONS OF LAW

We adopt the Administrative Law Judge's Conclusions of Law, with the following modification:

Substitute the following for Conclusion of Law 3:

"3. By constructively discharging Larry Crump, Terry Crump, Michael Martin, Bruce Smith, Richard Fleetwood, and David Meyer, on June 8, 1981, until on or about June 22, 1981; by discharging Larry Crump on September 4, 1981; and by discharging Terry Crump, Michael Martin, Bruce Smith, David Meyer, and Tracy Hahn on October 9, 1981, and not reinstating them, or any of them, to their former positions thereafter, Respondents violated Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Mueller Insulation Co. and The Mueller Company of Missouri, Inc., successor employer and/or *alter ego*, St. Charles, Missouri, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Larry Crump, Terry Crump, Michael Martin, Bruce Smith, David Meyer, and Tracy Hahn, if Respondents have not already done so, immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them. In the event that there is insufficient work for all of those to be offered reinstatement, Respondents shall place those employees for whom no employment is available on a preferential hiring list,[1] and make them and Richard Fleetwood whole for any loss of earnings they may have suffered by reason of Respondents' unlawful discrimination against them, in the manner set forth in the section of this Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from the files any references to the discharges of Larry Crump on September 4, 1981, and of Terry Crump, Michael Martin, Bruce Smith, David Meyer, and Tracy Hahn on October 9, 1981, and notify them in writing that this has been done, and that evidence of these unlawful actions will not be used as a basis for future discipline against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] While the Administrative Law Judge's recommended remedy properly requires Respondents to offer immediate and full reinstatement to Larry Crump and reinstatement to other employees on the basis of seniority and provides for the possibility that fewer than six installer positions remain at Respondents' facility, it does not expressly require that a preferential hiring list be established. Accordingly, we order that Respondents place the names of those employees, if any, for whom no employment is available, after distribution of all available positions, on a preferential hiring list, with priority in accordance with a system of seniority, and that Respondents thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work. See *Central Transport, Inc.*, 247 NLRB 1482, fn. 2 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against any employees in regard to their hire, tenure of employment, or any term or condition of their employment, in order to discourage membership in Carpenters District

Council of Greater St. Louis, Local No. 73, or any other labor organization.

WE WILL NOT inform employees that they can work only under nonunion conditions; WE WILL NOT imply a desire for reprisal against employees for causing us problems with the Union, or any other labor organization; and WE WILL NOT instruct that employees not be given work because of their tendency to support the Union, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer to Larry Crump, Terry Crump, Michael Martin, Bruce Smith, David Meyer, and Tracy Hahn, as is appropriate under the Board's Decision and Order, full and immediate reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other privileges, and WE WILL make them and Richard Fleetwood whole for any loss of earnings they may have suffered by reason of our unlawful discrimination against them, with interest. In the event that there is insufficient work for all of those to be offered reinstatement, WE WILL place those employees for whom no employment is available on a preferential hiring list.

WE WILL expunge from our files any references to the discharges of Larry Crump on September 4, 1981, and of Terry Crump, Michael Martin, Bruce Smith, David Meyer, and Tracy Hahn on October 9, 1981, and notify them in writing that this has been done, and that evidence of these unlawful actions will not be used as a basis for future discipline against them.

MUELLER INSULATION CO. AND THE MUELLER COMPANY OF MISSOURI, INC.

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard before me in St. Louis, Missouri, on February 22 and 23, 1982. The principal allegations of the amended complaint assert that Respondents Mueller Insulation Co. (herein Mueller Insulation) and The Mueller Company of Missouri, Inc. (herein Mueller Missouri), occupy a successor and/or *alter ego* relationship; that Mueller Insulation unlawfully laid off seven employees for a 2-week period in June 1981; that Mueller Insulation unlawfully discharged Larry Crump on September 4, 1981; that Mueller Missouri wrongfully discharged six[1] employees on October 9, 1981; and that agents of the two Respondents uttered various unlawful statements in June, July, and September 1981.[2]

The General Counsel has submitted a brief; Respondent has not. Based on the entire record[3] and my recollection of the demeanor of the witnesses, and having given careful consideration to the brief filed by the General Counsel, I make the following recommended findings of facts and conclusions of law.

I. THE SETTING

Since 1972, Earl and June Mueller operated an insulation contracting firm, from offices at 1810 Scherer Parkway, St. Charles, Missouri, under the corporate title of Mueller Insulation Co. Earl was the president and only member of the board of directors of that corporation, and June was its secretary.

Mueller Insulation was not the only Mueller business sheltered at the Scherer Parkway address; the record shows that a sole proprietorship called "Mueller Industries" was introduced there in 1980 and later resurrected, and, in September 1981, a newly created corporation, Respondent Mueller Missouri, was started and became a tenant of the same offices. For the moment, we will leave unexplored the relationship between these entities, and concern ourselves only with Mueller Insulation.

Promptly upon the inception of Mueller Insulation in 1972, the Muellers extended bargaining recognition to the Carpenters District Council of Greater St. Louis, Local No. 73, and signed a series of collective-bargaining agreements with that Union. In May 1980, Mueller, as part of the Insulation Contractors Association of Greater St. Louis, executed two 3-year agreements with the Union, one being a special "Reinsulation Agreement."

As of June 1981, Mueller Insulation was principally engaged in installing insulation in commercial construction and in residences, both new and old. Six[4] installers, all members of the Union, performed this work, the most senior being Larry Crump, who began employment with Mueller Insulation in June 1973 and, with the exception of a 1-month departure, was continuously employed thereafter.

The first event addressed by the complaint occurred on June 8, 1981. It is alleged that, on that date, Mueller Insulation laid off all its installers for a reason forbidden

[1] At the hearing, the General Counsel deleted the name of Rick Fleetwood from this allegation.

[2] It does not appear from the formal file that Respondent Mueller Missouri ever filed an answer to the complaint. Only two answers are contained in the file, one to the complaint in Case 14-CA-15342, issued on October 19, 1981, and the other to the order consolidating cases, amended complaint, and notice of hearing, issued on November 16. Although Mueller Missouri is named as a separate Respondent in both cases, the two answers are apparently filed only on behalf of Mueller Insulation (Respondent herein, the only employer of the employees herein, is the Mueller Insulation Co.). Counsel for the General Counsel has made no point of this in his brief.

[3] Certain errors in the transcript are hereby noted and corrected.

[4] Larry Crump, Terry Crump, Bruce Smith, David Meyer, Michael Martin, and Richard Fleetwood. Although the complaint alleges that Larry Craden was one of the installers laid off in June, G.C. Exh. 11 shows that Craden was not hired until September. I shall therefore omit Craden from my consideration of the allegation relating to the June 8 layoff.

by Section 8(a)(3) of the Act, and did not return them to work for some 2 weeks. That claim is considered hereafter.

II. THE JUNE 8 SEPARATION FROM EMPLOYMENT

On the morning of June 8, Earl and June Mueller met with the installers. Although the meeting lasted for 30 minutes or more, Larry Crump succinctly summarized its content as follows:

> Mr. Mueller told us that he no longer could afford the union wages and that it was costing him too much so he was going to have to let us go, but he also advised us that if we wanted to, we could go in and sign an application for the new company which was going to be non-union.

Crump further testified on recall that, on behalf of the employees, he asked Mueller for a day in which to consider the proposition; the men did not, however, return to work, and it appears that there was no subsequent discussion between the Muellers and the installers until the week of June 22, when Earl Mueller called the men and asked them to resume their employment.

Earl and June Mueller denied that the men had been confronted with a choice of "no union or no work" on June 8. Earl testified instead that he informed the employees at length about the "considerable losses" the Company had been experiencing, and he blamed these deficits on their poor productivity, accusing the employees of taking too long to work, to load trucks, and to get to the jobs, and of not properly recording their time. He further informed them that the firm no longer had any cash reserves, and that, "for all practical purposes, we are out of business." He purportedly asked the employees for "suggestions" about alleviating the problem. He denied, however, that he had told the employees that they could not continue to have union representation; he said, rather, that he ended by telling them, "We're going to have to make some changes. Let's figure out what to do," after which the men "indicated they needed some time to think about this and I agreed and they went on."

According to Earl, when he did not hear from the employees "right away," he contacted Union Business Agent Ray Brewer and notified him that he was going to put his three sons to work and "get some outside labor people to maybe give them a hand."

We have, therefore, a clear testimonial conflict as to whether the employees were given an ultimatum on June 8 or whether, as Earl Mueller indicated, he simply informed the men of the Company's financial straits and asked for their suggestions, and they afterwards stayed away from work on their own accord. On the face of it, of course, Larry Crump's version is vastly more appealing. It seems most unlikely that employees would simply abandon their livelihood because they were piqued by employer criticism of their performance or perhaps in order to ponder at leisure about possible "suggestions" they could make to help improve the Company's productivity. If, indeed, productivity and performance were thought by each to be the problem, it seems only reasonable that he would have proposed to the employees that they return to their jobs with renewed vigor and purpose, subject to a review of their efforts after a given time period; Earl conceded at the hearing, however, that he made no such proposal.[5]

Aside from logical considerations, however, the General Counsel has produced an abundance of evidence to confirm Larry Crump's account. Installers Richard Fleetwood and Terry Crump (brother of Larry), who were present on June 8, testified as Larry did, that they were presented a stark choice of working for a nonunion company or losing their jobs. Paul Brinkmann, an estimator and scheduler for Mueller Insulation, testified that after the June 8 meeting, Earl told him that he "had to lay the men off . . . he said that the wages were just too high." Sherri Mason, who worked as a telephone solicitor and secretary for Mueller Industries, testified that when she asked June Mueller, after the June 8 meeting, what had been discussed, June replied that "we've gone non-union."[6] Edward W. Schultz, Jr., who worked with Mueller Industries, testified that Earl told him that the June departure had been occasioned by the fact that "the men were costing them too much and they could do the job a lot cheaper with other manpower."

I found each of these witnesses most impressive and, despite the various grievances that they may have had against the Muellers, I do not believe that they were lying. Although June Mueller testified in support of her husband, I thought their testimony inadequate to rebut the substantial weight of the testimony proffered by the General Counsel. There are, in addition, other circumstances which tend to give the lie to the Muellers' case.

One is that after June 8, and before the regular employees returned, Respondent hired several other employees, incuding their three sons, to perform installation work. According to the Muellers, these employees were put on the payroll of Mueller Industries. This was a sole proprietorship started by Earl in January 1980 to conduct a remodeling business; it lapsed into disuse after 4 months and was reactivated around May 1981 for the purpose of selling windows in conjunction with Edward Schultz, a manufacturer's representative for the product. Putting the new employees hired in June on the Mueller Industries payroll while they performed insulation work contracted for by Mueller Insulation provides convincing evidence that Earl had indeed announced to the employees a plan to shift their work to a nonunion operation, and was attempting to act consistently with that scheme.

Moreover, it appears that the employees were not, as would follow from Earl's account, passively laying off and musing about ways to meet his objections to their performance. June's testimony shows that they immediately turned to their business agent for assistance and thereafter, in her words, "the negotiations" were with the business agent. The term "negotiations" ill fits the scenario described by Earl; it fits very well the one outlined by General Counsel's witnesses. And when the employees were finally recalled to work on or about June

[5] Earl's concession that he did not do so because what he was talking about, at bottom, was "money," may be read to mean that the problem discussed was not productivity, but rather, union scale.

[6] June denied having made this statement.

22—Earl explained that he could not hire enough installers to perform quality work in the interim, and also that there had been problems with the nonunion employees being run off unionized construction jobs—it was the result, said Earl, of a meeting with business agent Brewer in which "we agreed that we would take these men back." But Earl had no recollection of giving the men a pep talk about productivity once they had returned, and it would appear that the first reference thereafter to that topic was at a meeting between June, Brewer, and the men in August, some 6 weeks later.

There are other indications that the employees received an ultimatum on June 8. June Mueller testified that she told the men in August that she knew "that everyone had hard feelings and—and we were all pulling against each other at that point. . . ." Asked to explain the reference to "hard feelings," she said that when "the men came back, after the layoff, they were very—they just had a funny attitude. They weren't friendly . . . ." "Hard feelings" are more consistent with a forced departure than with, as Respondent would have it, a voluntary one. It should also be noted that, in this testimony, June used the word "layoff," although she had earlier been careful to refer to the period as one in which "the men did not choose to work." While, when this point was noted, she scrambled to suggest that the word "layoff" had simply been adopted by her from an earlier question, the record shows that she was in error on this point.[7]

While anything might happen in a world in which improbable events occur all the time, I am quite comfortable in concluding, on the basis of the foregoing discussion, that the installers were coerced into leaving the employment of Mueller Insulation from June 8 to around June 22 because they would not agree to surrender their union representation. Termination resulting from such an ultimatum plainly violates Section 8(a)(3) and (1) of the Act. *N.L.R.B.* v. *Ra-Rich Manufacturing Corporation*, 276 F.2d 451, 454 (2d Cir. 1960). "Imposing such a condition on continued employment discourages union membership almost as effectively as actual discharge. Plainly, § 8(a)(3) . . . includes an unreasonable and improper condition for retaining employment as well as actual discharge." *Henry A. Young, d/b/a Columbia Engineers International*, 249 NLRB 1023, 1031–32 (1980).[8]

The record makes clear that Mueller Insulation was suffering serious losses in 1981. There may well have been a problem with productivity, although it appears that the critical difficulty, as expressed by Mueller, was the level of the union wages. When an employer feels strangled by a union contract, it is understandable that he might seek out ways to alleviate his distress. If an employer feels that he is paying too much for the value he receives, employees can be disciplined or discharged, often an effective incentive to the others. Or an employer may attempt to renegotiate his contract with the union on a showing of his precarious financial condition. Requiring employees to forsake their union representation in order to believe his economic plight is not, however, a legally acceptable answer to the problem. See *George W. Ball, Phillip M. Steen, Arnold Sagolyn and Clayton Fitchey, t/a Northern Virginia Sun Publishing Company*, 159 NLRB 1634, 1644–45 (1966).

III. THE DISCHARGE OF LARRY CRUMP

The next event alleged in the complaint to be violative of Section 8(a)(3) is the termination of Larry Crump on September 4, 1981.

Crump, as earlier noted, was Respondent's senior installer, having been employed for more than 8 years at the time of his discharge. The record shows that he was regarded as Mueller's most able employee; he also served as a leadman, who organized the work and trained the new employees; and he probably acted more as a spokesman for the employees than any other installer.

Similarly, Sherri Mason testified that around July 24, while speaking on the phone to June Mueller about a payroll problem of Mueller Industries, June asked if Larry had done the Mueller Industries window job. Mason said he had not, and inquired as to why June had asked. June replied, "If he did, we're going to hang his ass with the Union because he's been giving us problems with them."

June denied having made such statements; Earl was not asked about the threat attributed to him by Schultz. I found Schultz and Mason most believable, and I infer from their testimony a decided animosity on the part of the Muellers against Larry Crump due to his activism in enforcing the collective-bargaining agreement. The testimony, of course, is relevant to the issue of why Crump was discharged on September 4.[9]

Subsequently, Crump again complained about the manner in which the contract was being enforced. At a meeting conducted by June with the installers in the first week in August, Larry asserted that two employees had not received wage increases in accordance with the agreement. Although June construed the contract to leave such decisions to the employer's discretion, she agreed, as a sign of good faith, to give Terry Crump and Michael Martin a raise.

Earl Mueller was in Atlanta for 2 weeks in July and the entire month of August. He returned to St. Charles on Friday, September 4, and reached his office at 2:30 or 3 p.m. At that time, he says, he began to check employee timecards and work records. At 4:30, he had a meeting with the installers at which he told them that they were not filling out their records properly. After this meeting, he called Crump aside and discharged him saying that he "hated to do this," but that, in Crump's words, his "footage wasn't up to par and that I was late too much." At the hearing, Earl agreed that these were the reasons he had assigned to the discharge.

[7] I also note Larry Crump's uncontradicted testimony that when Earl recalled him to work, he asked if Larry "wanted to come back as a union worker."

[8] The complaint alleges that the statement of choice by Earl to the men on June 8 also itself violated Sec. 8(a)(1) of the Act. While the statement might be argued to merge into the discharge, and thus be legally superfluous, I suppose that it would be appropriate to find the separate violation as charged.

[9] The statement to Mason is also alleged to be a separate violation of Sec. 8(a)(1). It seems reasonable to find coercive a disclosure to an employee of an employer's desire to get another employee in trouble with his union because that employee has been causing problems for the employer with the union, and I so conclude.

On their face, these asserted justifications are quite unconvincing. As to Crump's lateness, Earl testified that, on the day of discharge, he had examined Crump's time records for the preceding few weeks (having done so because Crump's cards happened to be on the top of the pile) and discovered that he had been repeatedly late, often arriving at 7:30 a.m. instead of the appointed hour of 7 a.m.

When Crump returned to work on June 22, he got into an argument with Earl Mueller, who expressed anger about the current policy with regard to the use of company trucks. When Mueller insisted that he would thereafter "go by the contract," Crump implied that he would do so too, making pointed reference to the fact that Mueller's sons "that were non-union [were] working on our jobs on Saturdays," a practice which had preceded the layoff. That day, Larry called the business agent and complained about this contract violation, and he further grieved that the installers were not receiving commercial pay for performing commercial work (which would amount to an additional 70 cents per hour). In addition, Crump told the business agent that the employees had not been remunerated appropriately for overtime work. Some time later, the employees were paid retroactively for commercial work earlier performed.

Crump continued to speak to the business agent several times a week, and at one point the latter suggested that the employees name a shop steward. Around mid-July, the men met at Crump's house and elected him to that post. There is no evidence in the record that Earl Mueller became aware of this election prior to his decision fire Crump.

There is, however, evidence that the Muellers were disturbed by Larry Crump's militancy. Sherri Mason and Edward Schultz both testified to an incident in July provoked by Schultz' request to June Mueller that he be allowed to use Crump (who had been selected by Earl to learn the technique of installing the new window line) to install a particular window job contracted for by Mueller Industries. Schultz credibly testified that June had given him permission to employ Crump's services, but apparently Crump decided to forgo the opportunity since it would have meant working at a piece rate, considered to be unacceptable for a union man.

When June later asked Schultz if Larry had done the job and was told that he had not, June said to Schultz that it was a "good thing" for Crump that he did not perform the work because, if he had, Respondent "would have hung his ass." Later that day, in a telephone conversation between Schultz and Earl, who was away in Atlanta attending to an insulation business he owned there, Schultz inquired about this remark, and Earl replied to the effect that "Larry's trying to play this Union thing to the hilt since they've been called back and he better watch his step all the way or else some things are going to happen," or "Larry had better his step [sic] and learn how to adhere to company rules because we thoroughly intend to enforce them."

The testimony shows, however, that being tardy had practically become a fixed term and condition of employment for Crump. For the 8 years he had worked, he had been late, in his words, "probably three or four days a week," and Mueller had, concededly, for 8 years chastised Crump for this chronic fault. Some 2 or 3 years before, Earl had attempted to do something about it, docking Crump's pay once or twice, but he had abandoned that effort in the fact of Crump's persistence. Paul Brinkmann testified that Crump's tardiness caused no delay, because the first 30–45 minutes of the day were devoted to loading trucks, and that could be done by Crump's assigned helper while he waited for Crump; and Edward Schultz testified to a conversation in which Earl had said that Crump's one fault was his tardiness, but that it was "nothing that couldn't be overlooked because his—his work more than made up for it." Against such a background, it hardly seems likely that Earl would have become so exercised about the fact that, in August Crump reported late for work, just as he had for the preceding 8 years.

The other reason given for the discharge—that Crump's "footage wasn't up to par"—is no less dubious. "Footage" refers to the amount of insulation installed by employees. The testimony shows that, each day, the installers are supposed to enter on their timecards the amount of footage they individually installed, whether "batt" or "blow," and also the amount and type of materials used. Some cards in evidence filled in by Crump during the period August 20–September 2 show that he was negligent in making these entries; that, however, was not a reason given by Earl as contributing to his discharge.[10]

There is another record, the work order, on which the installers are also supposed to designate how much material was used by each on a job. Earl conceded, however, that the men had fallen into the habit of only listing the total amount of material used by the entire crew. It follows, therefore, that whenever two or more employees worked on a job, it was not possible to tell, from the aggregate figure shown, how much work a certain employee had done. Obviously, this would have frustrated any effort to accurately determine whether or not Crump had performed poorly or not in the few weeks preceding September 4, especially since there is no indication that Crump had worked alone at any time during that period.

Mueller's attempt to explain his conclusion about Crump's subpar performance, in the face of these difficulties, was not very compelling. He said that even when Crump worked with another employee, if they failed together to measure up, "the journeyman would be the one that should hold the responsibility." This dictum, of course, fails to take account of the problems which might naturally arise on any job and the capability of the helper, among other things.[11] The same comments apply to Earl's testimony that, in attempting to calculate the work done by Crump, he used a rule of thumb of dividing the total shown on the work reports among the number in the crew on each job.

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[10] This sort of dereliction was also, as Earl said, not a new thing for Larry, who had not complied with the paperwork requirement "very often" in his 8 years.

[11] I think it worthy of note that Respondent failed to produce any records which, by comparison with earlier work orders, might provide an intelligible basis for Earl's claim of a perceptible decrease in Crump's performance.

It is, moreover, striking that, without prior warning, without preliminary inquiry into such material matters as the state of Crump's health or personal problems which might have had a bearing on his performance (it will be recalled that Mueller had been out of town for 6 weeks prior to September 4), and without offering a second chance, Mueller should simply announce, to his most veteran employee (referred to by Mueller himself at the hearing as "an extremely good insulator" in whom, before he started "slipping," Mueller "had a lot of confidence"),[12] that he was through after 8 years of faithful work, based on a hasty review of records in a few hours on a Friday afternoon.[13]

It appears to me that Mueller was thoroughly angry at Crump for his aggressive enforcement of the bargaining agreement in June, July, and August. At the first opportunity after his return from his lengthy stay in Atlanta, Mueller went to his office, reviewed Crump's records (not by happenstance), and thought that he could make a case for the "thorough enforce[ment]" of rules against Crump which Mueller had, in his conversation with Schultz, threatened against Crump for "trying to play this Union thing to the hilt."

Given the clear showing of animus against Crump and the speciousness of the reasons offered for his discharge, I am persuaded that the General Counsel has shown, by a preponderance of the evidence, that Crump's discharge on September 4, 1981, violated the statute.

IV. THE OCTOBER 9 DISCHARGES

The amended complaint alleges that the discharge of six named installers on October 9, 1981, also violated Section 8(a)(3).

After the regular employees returned to work in June, Mueller Insulation hired five more installers. Joseph Spooner started in late June and left in the third week in July; Tracy Hahn commenced work in the week ending July 8; Garlon Brown and Larry Craden started on September 11; and David Rennels began on September 14.[14]

Earl Mueller testified that by September his Company's financial condition had reached so deplorable a state that he and his wife were thinking about closing down entirely. Early in September, however, they were "approached" by Norm and Beverley Brown of Englewood, Colorado, whose identity and interest are not further explained, and agreement was reached that the Browns (apparently Mr. Brown) would contribute some money "to try to reestablish and rebuild a business." The new firm, to be called The Mueller Company of Missouri, Inc., would differ from Mueller Insulation not only in that it would "give up our commercial insulation altogether," but also it would be "a total energy type of business rather than just insulation and some windows," including new services such as ventilation systems, thermostats, caulking, weatherstripping, etc.

The initial registration report for Mueller Missouri was filed with the State on September 29; it shows Beverley Brown as president, June Mueller as secretary and treasurer, and a board of directors composed of Beverley Brown and the two Muellers. Earl was peculiarly uncertain at the hearing as to whether he had contributed any capital to the fledgling firm; as well, we do not know how much money the Browns infused, although Earl said it was "many thousands more" than he did. Beverley Brown and the two Muellers each received one-third of the capital stock.

Around the end of September, the installers were required to fill out new applications for employment with Mueller Missouri. Paul Brinkmann, the estimator and scheduler, testified that he was not asked to make a new application. Brinkmann further testified that the only immediate change in operations was that the corporate name on the trucks was changed to reflect the new entity. Terry Crump testified, without contradiction, that at this time, Earl told him that "the company had changed hands." When Terry asked if the company would continue to be unionized, Earl said that he would abide by the union rules until a contract was signed by the new company.

At some point, according to the testimony of June Mueller, new employee Tracy Hahn became a member of the Union, but apparently Garlon Brown, Larry Craden, and David Rennels, who had been hired in September and who, like the union installers, stayed with the Company when it changed over to Mueller Missouri,[15] never secured union membership.

Also around the end of September, Terry Crump and Michael Martin, both union members, told Paul Brinkmann that they did not want to work with nonunion employees and had been told by the Union that they did not have to. Brinkmann spoke to June Mueller about the problem, and they agreed not to pair union members with nonmembers in the same crew. Later that day, Brinkmann broached this subject on the telephone with Earl, who told him "not to work Terry Crump or Dave Meyers [sic] unless I had to because they were most likely the two to cause him problems."[16] In consequence, Brinkmann did not schedule the two men for several days, until he had no other choice but to use them.[17]

[12] Schultz testified that, prior to May, Earl had referred to Crump as "his best man."

[13] It is true, that, at Crump's behest, Mueller agreed to meet with him on Saturday to discuss the matter further; that came to naught, for reasons which need not be discussed here. What is important is that an employer would, in the given circumstances, determine to fire such an employee and announce his discharge without any investigation into the asserted deficiencies.

[14] See G.C. Exh. 11.

[15] The last entries made on the Mueller Insulation pay records were for the payroll period ending September 23 (G.C. Exh. 11); thereafter, the installers appear on Mueller Missouri payroll records beginning with the period ending September 30 (G.C. Exh. 6).

[16] Brinkmann exhibited uncertainty as to whether it had been Meyers or Martin who had joined Terry Crump in making the segregation request; Terry clarified that his fellow petitioner had been Martin.

[17] The complaint alleges, as a separate 8(a)(1) violation, Mueller's instruction to Brinkmann not to give work to the two employees "because of their tendency to engage in union activities." On this issue, Earl testified that on one occasion he told Brinkmann not to work Terry because the superintendent on the Delmar Gardens job had complained about Terry's poor performance, but he denied that he had otherwise interdicted work to any employee. I found Brinkmann a more impressive witness, and I credit his account. I further think that any such statement made to an employee (Brinkmann was not shown to have occupied a supervisory

Continued

On October 9, Earl called the installers together and told them that because business was so bad, the new company was, as testified by Brinkmann, "probably going to quit doing new construction and commercial and just do retrofit[18] and make it a very small company." All but two or three of the installers, union and nonunion alike, were discharged on that day. The complaint alleges that the discharge of six named installers was unlawfully motivated.

It is not clear from Earl's testimony whether or not he is saying that this development was part of the original plan for Mueller Missouri. He testified, as to the reason for the October 9 discharge: "There's no longer to keep going on [sic] when you—when you keep taking losses like that. . . . I couldn't afford the way the labor costs were going any more." But although this implies that the decision was made rather abruptly, he also testified, as earlier stated, that it was intended that Mueller Missouri would "give up our commercial insulation altogether." In any event, Earl decided to give away to other contractors, and withdraw existing bids on, commercial construction projects, which was done, and to devote the corporate energies only to retrofit insulation and the other energy services earlier described. While he gave away to other firms "a good half million dollars worth of profitable work if I had a crew that could do it," he "gave" to Mueller Missouri the Central Hardware account (presumably commercial insulation work) and also gave to Mueller Missouri the remaining Mueller Insulation residential work: "completions on jobs that were started."

While the Mueller Missouri corporation may have been imbued with a new "total energy" concept, there is no convincing indication in the record that, after the new entity came into being, the business performed any work which differed from the regular insulation work previously done. Earl's testimony as to what he "gave" to Mueller Missouri indicates that the new firm obviously could have anticipated, after October 9, having to perform a certain amount of insulation installation. The only type of work done by Mueller Missouri to which June made reference at the hearing was insulation.[19] The payroll records for Mueller Missouri show that 10 employees (other than those discharged) were hired either shortly before or after October 9; they are all classified on those records as "installers," just as the union employees were.[20]

Before considering the issue of whether the Act was violated by the October 9 layoff, we might appropriately consider at this point the legal status of Mueller Missouri in relation to these proceedings.

The complaint caption and body name Respondents as "Mueller Insulation Co." and "The Mueller Company of Missouri, Inc." Although these companies are referred to sometimes in the complaint collectively as "the Respondent," the complaint also alleges a separate basis for asserting jurisdiction over Mueller Missouri, i.e., that "[b]ased on a projection of its operations since September 17, 1981," that company "will perform services valued in excess of $50,000, of which services valued in excess of $50,000 will be performed in, and for, various enterprises located in states other than the State of Missouri." That assertion is denied in the answer filed by Mueller Insulation and there is no evidentiary support for it in the record. Whether, however, Mueller Insulation is the proper party to deny an allegation which affects Mueller Missouri is a nice question. Unless Mueller Missouri is, in law, an *alter ego* of Mueller Insulation, which the latter firm specifically denies, it would seem that Mueller Insulation has no legal interest in making such a challenge to the complaint insofar as it only affects Mueller Missouri.

It may be that the failure of Mueller Missouri to file an answer should be deemed an admission of all complaint allegations which pertain specifically to it, including both jurisdictional and substantive matters. The Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, provide, in Section 102.20, "All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown." That conclusion would, however, perhaps be hypertechnical in the circumstances of this case, and, moreover, would not be dispositive of other issues implicit in the complaint, such as whether Mueller Insulation is responsible for remedying violations by Mueller Missouri.

For purposes of the 8(a)(3) and (1) issues presented here, the question raised by the complaint of whether

position) would clearly have a tendency to restrain that employee's enthusiasm for engaging in concerted activity, and I therefore conclude that the instruction unlawfully coerced Brinkmann, in violation of Sec. 8(a)(1) of the Act.

The complaint takes a narrow view of this incident; it alleges only that Mueller's "advising" Brinkmann was a violation of Sec. 8(a)(1), and the allegation is grouped with two other 8(a)(1) "advising" allegations in par. 5 of the complaint. There is some basis here for also finding a "discrimination" violation of Sec. 8(a)(3), based on the results of that advice. But, as stated, the complaint does not raise that issue; the General Counsel's brief does not consider it; and I am not convinced that it was fully litigated. It well may be that if Respondent had believed that an 8(a)(3) violation was implicated, this aspect of the case would have been more thoroughly tried. I shall therefore limit my finding to the allegation contained in the complaint.

[18] Insulating existing residential dwellings.

[19] While Earl testified that "the bulk of our sales now consists of the whole—the whole thing, replacements, storms, ventilation systems, caulking, weatherstripping, day-night thermostats," June testified that windows are installed by the manufacturer's employees, and the only payroll records in evidence for the new company show no classification other than "installer."

[20] The records in evidence show only activity until the end of 1981. New employees are as follows: Robert Ernster, who began in the week ending September 30 and continued to work until the week ending November 4; Robert Cooper, began period ending October 7 and left period ending October 21; Allen Pullum, began period ending October 7 and left during period ending October 14; Robert Wehmeier, began period ending October 7 and worked 8-1/2 hours; Marvin Purvis, began week ending October 21 and apparently departed in December; John Wagner started week ending November 11, and was still working at end of December; Reynaldo Pena began in week ending November 18 and apparently left in week ending December 16. Also shown are the three sons of the Muellers: Gregg began work for Mueller Missouri in the week ending October 14 (Earl testified that he called Gregg back from his honeymoon to work) and worked through the end of the year; Chris worked 6 hours in the period ending October 14 and 10 more hours in December; and Tim worked several hours in December.

Missouri is a "successor employer" to Insulation is relevant only to whether Missouri is liable for remedying any unfair labor practices committed by Insulation, see *Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento* v. *N.L.R.B.*, 414 U.S. 68 (1973).[21] The issue of whether Missouri is an *alter ego* of Insulation is not necessarily more directly related to the merits of, as opposed to the remedy in, the case. Even if Mueller Missouri is, in effect, the same business as Mueller Insulation, that fact has no particular bearing on whether the October 9 layoff was an unfair labor practice (except insofar as the continuation of essential identity might suggest that the change of form was a facade intended to cloak an effort to escape the Union). The real substantive question here is whether Mueller Missouri, in discharging employees on October 9, violated the Act, and that is a question which is not controlled by its status as a successor or *alter ego*. Nonetheless, whether Mueller Missouri occupies any such status is relevant, at least for remedial purposes, and should be decided.

It seems clear that Mueller Missouri is a continuation of the business operation known as Mueller Insulation. Earl and June Mueller effectively managed the day-to-day operations of both companies. Earl owns all of the stock of Insulation, and he and his wife own two-thirds of the stock of Missouri, as well as two-thirds of the directorships, thus giving them effective control of the latter corporation. The new company operates out of the same offices as the old one, those premises being successively leased to both companies by a corporation called E & J Investment Company; E & J was formerly owned by Earl and June, and is now solely owned by June. According to June, the three trucks owned by Mueller Insulation were sold by that firm to a corporation called MBM Energy Incorporated, which is owned by the two Muellers and Norm Brown, and MBM has, in turn, leased the trucks to Mueller Missouri.[22]

The record shows that the Muellers juggled corporations with practiced ease, and this transition is another example. Despite whatever capital contribution the Browns may have made to the new entity,[23] the Muellers maintained effective governance of it, both operationally and in their roles of majority stockholders and directors.[24] And despite the claim of a broader "total energy" concept for the new business, the record gives no indication that it engaged in any field other than insulation, although eventually on a more restricted scale than before.[25]

While it is possible that a broader range of activities was anticipated for Mueller Missouri, that would not be a sharp departure from the activity of Mueller Insulation, which not only installed insulation, but, also, as Schultz and June Mueller testified, had directly installed "several" window jobs in 1981. Whatever additional services might have been planned by Mueller Missouri would not have "so changed the nature of the enterprise and its job situations as to cause it to be outside the bounds of legitimate remedial area in respect to the discriminatees." *N.L.R.B.* v. *Ozark Hardwood Company*, 282 F.2d 1, 6 (8th Cir. 1960).[26] See also *Custom Manufacturing Company, et al.*, 259 NLRB 614 (1981).

I therefore conclude that, for remedial purposes, Mueller Missouri was out an extension, in slightly altered garb, of Mueller Insulation. The principal effect of this conclusion is to hold Missouri jointly and severally liable for the June layoff and the discharge of Crump in September, and to make Insulation accountable for the October discrimination hereafter found.

The General Counsel argues that the changeover from one corporate form to the other was the first step of a two-part scheme to oust the Union, the second step being the discharge of the installers on October 9. The first part of the theory seems probable to me. In its June layoff, Respondent Mueller Insulation had evidenced a desire to achieve nonunion status by moving its employees to another payroll. Three months after that effort failed, a new corporation, owned and managed by the Muellers, using the same offices and equipment as before, and engaged in the same kind of business, came into being. I can perceive no reason for creating the new entity, the purposes of which could have been equally well-served by continuing Mueller Insulation, except an unlawful one.

The only arguable flaw in this approach is that the union installers were in fact temporarily retained at the time of the transition. It might be thought, however, that the Muellers would have viewed a wholesale dispatch at the time of transition as too blatant and obvious an act, hoping, instead, to achieve their purpose in less dramatic stages.

A finding on this point is not, however, necessary to a conclusion that Section 8(a)(3) was violated here. Neither the complaint nor the General Counsel's brief asserts an 8(a)(5) violation or seeks a bargaining order. The only point put in issue by the amended complaint is

[21] If the complaint contained an 8(a)(5) allegation relating to a failure to bargain on the part of Mueller Missouri, then the "successorship" issue would also take on a substantive dimension.

[22] Either June is in error or the tangle of corporate shells has confused Earl; he testified that Missouri purchased the trucks directly from Insulation.

[23] As discussed, that figure was never clarified. It is hard to believe that it amounted to very much, judging from a January 31, 1982, balance sheet for Mueller Missouri. Further, I agree with the General Counsel's argument that the Muellers very likely contributed their fair share to the corporation. An arrangement in which a stockholder contributes most or all of the capital and is satisfied with only one-third of the stock is not inconceivable, but it would be most extraordinary.

[24] The Board has found an *alter ego* relationship even where the parties controlling one corporation have no formal interest, but only a "family" one, in the second. *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976).

[25] June testified that she "liquidated all the assets" of Mueller Insulation in order to pay creditors. The only detail given, however, was that "we sold office furniture." It seems doubtful that very much furniture was sold, since the business continued in operation.

[26] The court also stated:

> In National Labor Relations Act perspective, it is also possible for a business to have the significance and effect of a disguised continuance of the old employer, without ownership identity necessarily existing, where such business allows itself to become a substitute in carrying on the operations, or some of them, of the old employer, under a relationship serving to benefit the latter's owners and intended as one of cooperation with them in evading the consequences of the unfair labor practices committed." [*Id.*, at 5.]

whether the discharge of six installers on October 9, and the failure to reinstate them later, violated the Act.

My conclusion is that those actions were violative. Even if Mueller Missouri was not deliberately established as a device for getting out from under the Union, and I think that it may have been, it certainly appears that the October 9 discharges were made with an eye to avoiding entanglement with the Union. In so finding, I note that, as Earl testified, it appears that he intended on October 9 to reduce the volume of his operation, an intention corroborated by the work farmed out to other contractors and the bids withdrawn. The payroll records for the last 2 months of 1981 show a greatly reduced workload. There is no basis in this record for attributing that decrease to any cause other than a legitimate desire to diminish the scope of the business. It is possible, of course, that the Muellers intended to deliberately depress the workload, and get rid of the employees, until some future time at which it would be considered safe to rebuild the business and staff the work force with nonunion employees. There is, however, no historical or other evidence to support such a contention[27] and the General Counsel urges no such theory.[28]

Nonetheless, the method of selection used by Mueller Missouri for retaining and hiring employees after October 9 indicates a calculated desire to avoid employing union members. The record shows, as earlier set out, that, as of and after October 9, Respondent retained and hired only nonunion employees. Only two employees, both nonunion, were kept on the payroll on October 9: Robert Ernster, who had been hired in the payroll week ending September 30 and continued to work until the week ending November 4; and Robert Cooper, who began in the period ending October 7 and was retained until the week ending October 21.[29] The Muellers' son Gregg began in the week of the discharges and kept working; Marvin Purvis, John Wagner, and Reynaldo Pena were all hired subsequent to October 9 and performed fairly substantial amounts of work thereafter.

The explanation given by Earl Mueller for not retaining or rehiring any of the union people who were discharged on October 9 itself seems to legally constitute an admission of violation: "They made it pretty clear that they didn't want to work with nonunion people and there's no need to bring union people in when we're not doing anything and there really wasn't enough work to worry about." The unspoken premise here, of course, is that there would definitely be nonmembers on the payroll. The fact is that only two of the union installers, Terry Crump and Michael Martin, had registered any protest at all against working with nonunion employees, and Mueller had no sound basis for believing that any of the union members, including Crump and Martin, would prefer not to work at all rather than to work alongside nonmembers. To reject union members for employment on the basis of such a fragile assumption is, in and of itself, an unlawful discrimination against them. *Sossamon Electric Company and Sossco Building System, Inc.*, 241 NLRB 324, 327 (1979):

> George, Jr.'s admission that he did not offer any of the Sossamon employees positions with Sossco because he did not believe that union members would accept work with a nonunion company, without ever asking the employees whether they would, evidences this intent and, independently, constitutes discrimination in violation of Section 8(a)(3).

But I do not, in any event, believe that Mueller chose not to work his former employees for the reasons given.[30] It seems clear, rather, that he wished to avoid any union taint, and the possibility of having to pay union scale, in the revamped organization. While employing and hiring new and presumably untested employees such as Ernster, Cooper, Purvis, Wagner, and Pena, he rejected some obviously valued employees, such as David Meyer (to whom Earl had, in August or September, given two wage raises in 1 day because Meyer was "a young, hard-working man . . . [who] was really busing his hump") and Bruce Smith (who was, Earl said, "a good insulator. He was always on time, he always worked hard all day long, and his average was always the same . . . I could live with ten Bruce Smiths.").

On the record evidence of the amount of work performed by Respondent after October 9, I cannot assume that most of the installers, even in normal circumstances, would have been retained on the payroll. Nonetheless, because I am satisfied that the sole criterion used for selecting employees for retention on October 9, and for hiring thereafter, was union membership, it is fair to say that some of the discharges that day, and some of the subsequent failures to rehire, violated the Act.

There is a problem with respect to the identity of the discriminatees who may benefit from this ruling. The complaint names five union members (Terry Crump, Michael Martin, Bruce Smith, David Meyer, and Tracy Hahn)[31] and one nonmember, Larry Craden. Why Craden is included in the complaint, but other nonretained nonmembers Allen Pullum and, perhaps, Garlon Brown[32] are excluded, is unexplained.

I see no reason I find that Craden was the subject of discrimination. Some nonmembers were retained on Oc-

[27] The case was heard in February, only 4 months after the mass discharge.

[28] On brief, the General Counsel takes note of the reduction of work after October 9 and simply argues: "The mere fact that not all of Respondent's employees would have continued to work on a regular basis on October 9 relates only to remedy."

[29] Oddly, at the hearing Earl Mueller testified that he had "terminated all employees" on October 9. Earl was also asked at the hearing why he did not recall the nonmembers, as well as the members, who were laid off on October 9, and his reply was that he wanted to "try to start fresh and start from scratch and hopefully try to rebuild and make something of it." But the fact is, as discussed above, two nonmembers were retained on October 9, thus spoiling the fresh start *ab initio*.

[30] The other reason—that there was not enough work to do—is apparently true as to *all* of the employees, but not as to *some* of them.

[31] As earlier noted, the name of Richard Fleetwood is also alleged, but the record shows that Fleetwood was discharged prior to October 9.

[32] Brown may have left Respondent's employ by October 9; the last wage payment to him was for the period ending October 7. Pullum is shown as having worked 10 hours in the week ending October 14, the same week in which the employees were discharged. According to the unobjected to hearsay testimony of Terry Crump, nonmember David Rennels worked until October 12, when he quit, but June said that he was discharged on October 9.

tober 9, earning no more than Craden, and some nonmembers were let go. There does not appear to be any basis for thinking that Craden's release, or subsequent failure to be recalled, was related to union consideration.

I shall therefore limit the class of discriminatees to the other five employees named in the next preceding paragraph. The task of sorting out the losses suffered by all or some of them will have to await the compliance stage of this proceeding.[33]

CONCLUSIONS OF LAW

1. Respondents Mueller Insulation Co. and The Mueller Company of Missouri, Inc., are employers engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act, and are *alter egos* of the same business entity.

2. Carpenters District Council of Greater St. Louis, Local No. 73, is a labor organization within the meaning of Section 2(5) of the Act.

3. By constructively discharging Larry Crump, Terry Crump, Michael Martin, Bruce Smith, Richard Fleetwood, and David Meyer, on June 8, 1981, until on or about June 22, 1981; by discharging Larry Crump on September 4, 1981; and by discharging Terry Crump and/or Michael Martin and/or Bruce Smith and/or David Meyer and/or Tracy Hahn on October 9, 1981, and not reinstating them, or any of them, to their former positions thereafter, Respondents violated Section 8(a)(3) and (1) of the Act.

4. By, on June 8, 1981, informing employees that they could only work under nonunion conditions; by, on or about July 24, 1981, implying that Respondent desired reprisal against an employee for causing union problems; and by, on or about September 28, 1981, instructing that employees not be given work because of their tendency to support a union, Respondents violated Section 8(a)(1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I shall recommend that Respondents be ordered to cease and desist from the unfair labor practices found, and to take affirmative action designed to restore the *status quo ante.*

Compensation for the wages and other benefits lost by the six employees who did not work from June 8 until on or about June 22, plus interest computed as described below, is in order. In addition, a reinstatement and backpay order is proper for at least some of the employees, but I cannot, on this record, identify which ones.

At present, it seems appropriate to order that Respondent should be required to offer immediate and full reinstatement to Larry Crump and the five employees discharged on October 9, 1981, to the extent that they presently have insulation installer or similar positions on their payrolls. On this record, it seems fair to say that, in ordinary circumstances, Larry Crump would have been retained in preference to the other installers, so it is appropriate that he be accorded first priority for any such position. In the absence of any better yardstick, offers of reinstatement to any remaining positions should be made by seniority of employment. Such reinstatement shall be to the former or substantially similar positions of the discriminatees, without prejudice to their seniority and other rights and privileges, dismissing if necessary any employees presently employed by Respondents. Larry Crump and the other five employees should also be made whole for loss of pay and other benefits, Crump for the period from September 4, to October 9, 1981, and Crump and the other five employees for such periods of time after October 9, 1981, as they might reasonably have been expected to be employed, as earlier discussed. Backpay and other benefits, less interim earnings, shall be paid as prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962), and *Florida Steel Corporation,* 231 NLRB 651 (1977). The liability of the two Respondents is joint and several.

Finally, the customary notices should be posted.

Upon the basis of the entire record, the findings of fact, and conclusions of law made here, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[34]

The Respondents, Mueller Insulation Co. and The Mueller Company of Missouri, Inc., successor employer and/or *alter ego* St. Charles, Missouri, their officers, agents, successors, and assigns, shall:

(a) Discharging or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of employment, in order to discourage membership in Carpenters District Council of Greater St. Louis, Local No. 73, or any other labor organization.

(b) Informing employees that they can work only under nonunion conditions; implying to employees a

[33] It would appear that, at least for the remainder of 1981 (the only period for which records were introduced in this proceeding), the total potential amount of work available to the discriminatees was small. Cooper worked perhaps only 24 hours after October 9; Ernster worked about 3-1/2 full weeks after October 9; Purvis worked, starting the week ending October 21, about 280 hours in 9 weeks; Wagner worked about 280 hours in 8 weeks beginning in the week ending November 11; Pena worked, beginning in the week ending November 18, perhaps 140 hours in 5 weeks; and Gregg Mueller worked, starting right after the discharges, about 450 hours in 12 weeks. It seems appropriate to infer that, absent unlawful considerations, no more than three union employees (in place of Cooper, Ernster, and Gregg Mueller) would have been retained on October 9, and the others lawfully released. However, it would also be appropriate to find that Respondent discriminated against other members of the union group in making later hires, specifically the hire of Wagner in the week ending November 11 and Pena in the week ending November 18 (both of them having been hired several weeks subsequent to the filing of the 8(a)(3) charge on behalf of the union members). I do not refer to Purvis because he probably replaced Cooper in the week ending October 21.

[34] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

desire for reprisal against employees for causing problems with the Union, or any other labor organization; instructing that employees not be given work because of their tendency to support the Union, or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Larry Crump and/or Terry Crump and/or Michael Martin and/or Bruce Smith and/or David Meyer and/or Tracy Hahn, if Respondents have not already done so, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them and Richard Fleetwood whole for any loss of earnings they may have suffered by reason of Respondents' unlawful discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

(c) Post at their St. Charles, Missouri, offices, copies of the attached notice marked "Appendix."[35] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[35] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."